No. 15-278

IN THE

Supreme Court of the United States

AMGEN, INC., *et al.*,

Petitioners,

v.

STEVE HARRIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. Whether Petitioners have presented any compelling reason to review the Ninth Circuit's *de novo* analysis of the sufficiency of the allegations of the Complaint, in which the Ninth Circuit concluded that a claim had been plausibly alleged for breach of the duty of prudence under ERISA.

II. Whether Petitioners have presented any compelling reason to review the Ninth Circuit's *de novo* analysis of the sufficiency of the allegations of the Complaint, in which the Ninth Circuit concluded that a claim had been plausibly alleged for breach of the duty of candor under ERISA.

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INTRODUCTION

This case involves claims that the fiduciaries of an employee benefit plan violated their duties of loyalty and prudence under the Employee Retirement Income Security Act of 1974 ("ERISA") by allowing the plan to continue to invest in company stock when it was allegedly no longer prudent to do so.

Petitioners present two questions for the Court's review. The first question is whether the decision below of the Ninth Circuit conflicts with *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) ("*Fifth Third*"), with respect to what a pleading must plausibly allege fiduciaries are required to do when in possession of material nonpublic information. Review of this question is not necessary because the Ninth Circuit correctly applied the considerations set forth in *Fifth Third* to the allegations of the Complaint in this case. Moreover, because the Ninth Circuit is the first and only appellate court to interpret the considerations concerning a fiduciary's duties with respect to nonpublic information, as set forth in *Fifth Third*, review at this time is premature.

The second question Petitioners present is whether the Ninth Circuit erred in extending the presumption of individual reliance, established by the Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), to a misrepresentation claim under ERISA. Review of this question is unnecessary because there is no disagreement among the appellate courts on this issue. In fact, the Ninth Circuit is the only appellate court to apply the presumption of reliance to an ERISA claim. Moreover, the applicability of a presumption of reliance is unlikely

to recur or become the source of disagreement among the lower courts because individual reliance is not an element of an ERISA misrepresentation claim. Finally, to the extent that proof of individual reliance is a necessary element of an ERISA misrepresentation claim, the Ninth Circuit correctly applied a presumption of reliance.

Petitioners have failed to demonstrate that there are any compelling reasons for this Court to grant their Petition for a writ of certiorari. Sup. Ct. R. 10. Accordingly, the Petition should be denied in its entirety.

COUNTERSTATEMENT OF THE CASE

A. Statutory Background

ERISA was designed to ensure "the continued well-being and security of millions of employees and their dependents" through the regulation of employee benefit plans. *See* 29 U.S.C. § 1001(a). *See also Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 47 (2d Cir. 2009) (ERISA's central purpose is "to protect beneficiaries of employee benefit plans") (citation omitted). To provide protection to retirement plan participants, ERISA imposes exacting duties on the fiduciaries of retirement plans, requiring that fiduciaries perform their duties under a plan "solely in the interest of the participants and beneficiaries" of the plan and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(A) and (B). These fiduciary obligations have been called "*the highest known to the law.*" *La Scala v. Scrufari*, 479 F.3d 213, 219 (2d Cir.

2007) (emphasis added) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (Friendly, J.)). *See also Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (noting that ERISA was enacted to *strengthen* the standards of trust law).

Prior to the Supreme Court's recent holding in *Fifth Third*, numerous Courts of Appeals had been erroneously applying – at the pleading stage and throughout the case – a "presumption of prudence" to ERISA fiduciary decisions to offer and maintain company stock in a retirement plan,[1] which could only be overcome with allegations and then proof that the company faced "dire circumstances" or the like. *See, e.g., Quan v. Computer Scis. Corp.*, 623 F.3d 870 (9th Cir. 2010); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 139-40 (2d Cir. 2011). In *Fifth Third*, the Supreme Court unanimously rejected that presumption, holding that "[i]n our view, the law does not create a special presumption favoring ESOP fiduciaries. Rather, the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings." *Fifth Third*, 134 S. Ct. at 2467. The Court criticized the presumption for making it nearly impossible for a plaintiff to a state an ERISA duty of prudence claim, *id.* at 2466, and concluded that the pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), serve to sufficiently limit ESOP claims, just as they serve to sufficiently limit all civil claims. *Id.* at 2470. *Fifth Third* was followed by *Tibble v. Edison International*, 135 S. Ct. 1823 (2015), in which the Court

1. The company stock is generally held in an Employee Stock Ownership Plan ("ESOP").

unanimously held (in the context of determining when the statute of limitations on an ERISA duty of prudence claim began) that ERISA fiduciaries have "a continuing duty to monitor trust investments and remove imprudent ones." *Id.* at 1828.

B. The Parties

Petitioner Amgen, Inc. ("Amgen") a global biotechnology company, is the "named fiduciary," "administrator," and "sponsor" of the Amgen Plan. Petitioner Amgen Manufacturing, Inc. ("AML"), a wholly owned subsidiary of Amgen, is the "named fiduciary," "administrator," and "sponsor" of the AML Plan. Other Petitioners include the committees at Amgen that oversaw Amgen's retirement plans, as well as the six individuals who served on those committees during the alleged class period (May 4, 2005 to March 9, 2007) ("Class Period").

Respondents are former employees of Amgen or AML and participants in the Amgen Plan or the AML Plan (collectively, the "Plans"), who held units of an ESOP fund held in the Plans that consisted almost entirely of Amgen common stock (the "Amgen Stock Fund"). Respondents brought this action on behalf of the Plans, under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), to recover damages to the Plans caused by Petitioners' breaches of their fiduciary duties under ERISA § 404, 29 U.S.C. § 1104.

C. The Plans

The Plans are "defined contribution plans" within the meaning of ERISA,[2] and were established by Amgen as part of its employment bargain with its employees to provide retirement benefits subject to the provisions of ERISA. During the Class Period, the Plans permitted the Amgen Stock Fund to be one of the investment options, while expressly requiring the Plans' fiduciaries to periodically review its performance.

D. The Complaint and District Court Proceedings

In August 2007, Respondents filed the initial complaint in this proceeding, and in March 2010, an amended complaint (the "Complaint") was filed.[3] The Complaint asserts claims under ERISA §§ 404(a)(1)(A)-(B), 29 U.S.C. §§ 1104(a)(1)(A)-(B). Two of those claims are relevant to the Petition.

In Count II, the Complaint alleges that Petitioners breached their fiduciary duty of prudence by allowing the participants of the Plans to invest in the Amgen Stock Fund when they knew or should have known that Amgen was engaged in unsustainable business practices

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2. In a "defined contribution plan," retirement benefits are based solely on the amount contributed to the participant's individual account, and any income, expenses, gains or losses are allocated in turn to each such participant's account. 29 U.S.C. § 1002(34).

3. The district court dismissed the initial complaint on standing and other threshold grounds. That dismissal was reversed by the Ninth Circuit. *See Harris v. Amgen, Inc.*, 573 F.3d 728, 737-38 (9th Cir. 2009).

(serious safety and efficacy concerns regarding its two most important drugs), and that the Amgen Stock Fund was therefore trading at artificially inflated prices.

In Count III, the Complaint alleges that Petitioners breached their fiduciary "duty of candor" under ERISA (considered by judicial decision to be a component of the fiduciary duties of loyalty and prudence under 29 U.S.C. § 1104(a)(1)), by providing materially misleading information regarding the financial condition of Amgen to the Plans' participants.

On June 18, 2010, the district court ruled that the allegations of the Complaint did not state a claim that the fiduciaries of the Plans breached their fiduciary duties under ERISA. App. 77a-108a. With respect to Count II, the district court held that Petitioners' conduct was shielded by the "presumption of prudence," and that such presumption was not overcome because the allegations did not sufficiently allege that Amgen's condition was "seriously deteriorating" or was "on the brink of collapse or undergoing serious mismanagement." App. 97a. With respect to Count III, the district court held that individual detrimental reliance was required but not pled. App. 104a.

E. Proceedings in the Ninth Circuit

On appeal, the Ninth Circuit, *inter alia*, reversed the district court as to both Counts II and III of the Complaint. *Harris v. Amgen*, 738 F.3d 1026, 1039-42 (9th Cir. 2013) ("*Harris I*").

With respect to Count II, the Ninth Circuit held that the presumption of prudence did not apply because the

Plans did not "require or encourage the fiduciary to invest primarily in employer stock." *Id.* at 1036-39 (citing *Quan*, 623 F.3d 870. Assessing the allegations of Count II under ERISA's statutory "prudent man" standard of care, rather than the presumption of prudence, the Ninth Circuit found that Respondents had sufficiently alleged a viable claim for breach of the duty of prudence. *Id.* at 1041-42. In response to the Petitioners' arguments that they were unable to act on nonpublic information, the Ninth Circuit held that Petitioners (many of whom were also insiders of Amgen), while not required to sell company stock based on nonpublic information, had certain other actions available to them including restrictions on further investment in company stock and the disclosure of the allegedly material nonpublic information to the general public. *Id.* at 1041-42.

With respect to Count III, the Ninth Circuit held that participants of the Plans were entitled to invoke a rebuttable presumption of individual reliance based on the "fraud-on-the-market" theory. *Id.* at 1043 (citing *Basic*, 485 U.S 224). As the Ninth Circuit stated, ["w]e see no reason why ERISA plan participants who invested in a Company Stock Fund whose assets consisted solely of publicly traded common stock should not be able to rely on the fraud-on-the-market theory *in the same manner as any other investor*[.]" *Id.* (emphasis added).

F. Initial Petition for a Writ of Certiorari and the *Fifth Third* Decision

Following the Ninth Circuit's reversal, Petitioners petitioned for a writ of certiorari, arguing that (1) the "presumption of prudence" should have been applied to Count II of the Complaint; and (2) the "presumption of

detrimental reliance" should not have been applied to Count III of the Complaint.

While the petition was pending, the Court decided *Fifth Third*, in which it rejected the application of a presumption of prudence to ERISA duty of prudence claims. The Court held that, rather than any "special" standard for ESOP fiduciaries, the "important task" of "weed[ing] out meritless lawsuits" should be accomplished "through careful, context-sensitive scrutiny of a complaint's allegations" under Rule 12(b)(6). *Fifth Third*, 134 S. Ct. at 2470. With respect to claims based on nonpublic company information, the Court directed lower courts "to bear in mind that the duty of prudence, under ERISA as under the common law of trusts, does not require a fiduciary to break the law," and that to sustain such a claim "a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Id.* at 2472.

In light of its decision in *Fifth Third*, the Court granted the petition (as well as other petitions pending in similar ERISA duty of prudence cases), vacated the Ninth Circuit's judgment, and remanded the case to the Ninth Circuit for further consideration. *See Amgen Inc. v. Harris*, 134 S. Ct. 2870 (2014).

G. Post-*Fifth Third* Proceedings in the Ninth Circuit

On remand, after review of new briefing by Petitioners and Respondents, the Ninth Circuit issued a new opinion in light of the Court's holding in *Fifth Third*. *Harris*

v. Amgen, Inc., 770 F.3d 865, 875-79 (9th Cir. 2014) ("*Harris II*"). The Ninth Circuit again reversed the district court with respect to both Counts II and III of the Complaint.

Petitioners petitioned for rehearing *en banc*, arguing that the Ninth Circuit's decision conflicted with the Court's holding in *Fifth Third*. The Ninth Circuit denied rehearing, with an *en banc* dissent from that denial, and issued an amended opinion in which it further clarified its reversal of the district court's dismissal of Counts II and III of the Complaint. *Harris v. Amgen*, No. 10-56014 (9th Cir. May 26, 2015) (attached in an Appendix ("App.") to the Petition, App. 1a-57a).

With respect to Count II, the Ninth Circuit applied the considerations set forth in *Fifth Third* and found it plausible that Petitioners could have taken alternative actions – including the removal of the Amgen Stock Fund as an investment option in the Plans or the public disclosure of the alleged nonpublic information – without violating the securities laws, and that it was plausible that a prudent fiduciary would not have viewed such actions as more likely to harm the fund than to help it. App. 39a-45a.

With respect to Count III, the Ninth Circuit repeated its prior rejection of the district court's conclusion that this claim should be dismissed because Respondents had failed to plead individual reliance. App. 47a.

CONSIDERATIONS GOVERNING DECISION AS TO WHETHER TO GRANT A PETITION FOR A WRIT OF CERTIORARI

Under Supreme Court Rule 10, a petition for a writ of certiorari "will be granted only for compelling reasons." Under Rule 10, a petition for a writ of certiorari may be granted if a Court of Appeals "has entered a decision in conflict with the decision of another Court of Appeals on the same important matter," or where a Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10 concludes: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

As discussed herein, none of the reasons for granting a writ of certiorari are present here.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S DUTY-OF-PRUDENCE HOLDING DOES NOT WARRANT SUPREME COURT REVIEW

A *Fifth Third* Rejected Any Special Pleading Standard for ESOP Fiduciaries

In *Fifth Third*, the Court invalidated the "presumption of prudence" that had been adopted by numerous circuit courts and that had limited the circumstances in which a fiduciary could be held liable for violating the duty of prudence with respect to company stock held in an ERISA plan. Pursuant to the holding in *Fifth Third*, ESOP fiduciaries, like all ERISA fiduciaries, must discharge

their duties with respect to a retirement plan "solely in the interest of the participants and beneficiaries"; "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . ."; and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* at 2465 (quoting 29 U.S.C. § 1104(a)(1)(A)-(B)).

Fifth Third squarely rejected the need for any "special" standard for ESOP fiduciaries based on considerations that were peculiar to ESOPs – *including the possibility that ERISA fiduciaries might also be company insiders and therefore have access to material nonpublic information* – concluding that such issues can be addressed "through careful context-sensitive scrutiny of a complaint's allegations" pursuant to the plausibility standards of *Iqbal* and *Twombly*. *Id.* at 2469-71. With respect to a claim that an ESOP fiduciary imprudently failed to act in light of material nonpublic information, *Fifth Third* stated:

> To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action *that the defendant could have taken* that would have been consistent with the securities laws and that a prudent fiduciary would not have viewed as more likely to harm the fund than to help it.

Id., 134 S. Ct. at 2472 (emphasis added).[4]

4. The Court also set forth three points to "inform" a lower court's consideration. *First*, fiduciaries are not required by their

B. The Ninth Circuit's Decision with Respect to Count II Correctly Adhered to the Considerations Set Forth in *Fifth Third*

Petitioners argue that *Fifth Third* announced "new and daunting pleading" requirements applicable to duty of prudence ERISA cases. Petition at 17 (citing *en banc* dissent at App. 11a12a). But, that is not true. Rather, while the Ninth Circuit acknowledged the liability considerations announced by *Fifth Third*, pursuant to which "a fiduciary is not required to perform an act that will do more harm than good to plan participants," it correctly reasoned that the Court's rejection of the extra-statutory "presumption of prudence" and citation to *Iqbal* and *Twombly* indicated that *Fifth Third* did *not* articulate a new pleading standard. App. 44a-45a.

Review of the Ninth Circuit's holding with respect to Count II of the Complaint is not warranted because the Ninth Circuit correctly adhered to the considerations set forth in *Fifth Third*. The Ninth Circuit directly cited the liability considerations set forth in *Fifth Third* (App. 39a), and assessed the allegations of the Complaint in connection therewith. The Ninth Circuit found that it was plausible

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ERISA duty of prudence to break the law. *Id. Second*, the fiduciary should consider the extent to which refraining from making a planned trade or disclosing inside information to the public "could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws. " *Id. Third*, the court assessing the pleading should consider if the complaint has plausibly alleged that a prudent fiduciary in the defendants' position "could not have concluded that stopping purchases . . or publicly disclosing negative information would do more harm than good to the fund . .". *Id.* at 2473.

for Petitioners to have removed the Amgen Stock Fund from the Plans, which would thereby have prevented plan participants from investing additional money in the fund at inflated prices. App. 40a-41a. The Ninth Circuit also found, based on the large amount of actively traded shares of Amgen stock in the market, that it was plausible that such action would not have had an appreciable negative impact on Amgen's stock share price, given the relatively small number of shares purchased by the Plans relative to the volume of Amgen stock traded in the market. *Id.*

The Ninth Circuit also found that it was plausible for the fiduciaries to have disclosed the nonpublic information:

> If defendants had revealed material information in a timely fashion to the general public (including plan participants), thereby allowing informed plan participants to decide whether to invest in the Amgen Common Stock Fund, they would have simultaneously satisfied their duties under both the securities laws and ERISA . . . .

App. 43a (citations omitted).

Petitioners take issue with the Ninth Circuit's holding in various respects. The *en banc* dissent argues that under the Ninth Circuit's ruling, "withdrawing the fund will *always* be the better option, because any stock price decline it may precipitate will be deemed inevitable." App. 4a (citing *en banc* dissent at App. 16a). However, as the Ninth Circuit held, where the securities laws require disclosure of previously withheld material information, "the impact of the eventual disclosure of that information must be taken into account in assessing the net harm that

will result from the withdrawal of the fund." *Id.* at 5a. In such a case, "it is plausible to conclude that the withdrawal of the fund will result in a net benefit, rather than a net harm, to plan participants." *Id.*[5]

Petitioners also argue that the Ninth Circuit painted with too broad a brush because *some* of the fiduciaries were not company insiders. Petition at 15. However, as the Ninth Circuit made clear, "nothing in our opinion prevents defendants from arguing on remand from this court that their liability, or the extent of their liability, should depend upon the extent to which they knew, or should have known, that material information was being withheld from the public in violation of the federal securities laws, and the extent that they had, or did not have, an obligation under those laws to reveal such information to the public." App. 43a-44a.

Petitioners also argue that the ruling could impose greater disclosure obligations on ERISA fiduciaries than those imposed under the federal securities laws, as well as continuous disclosure obligations that are not required by the securities laws. Petition at 19. However, the Ninth Circuit "carefully restricted our description of defendants' disclosure duties under ERISA to those disclosure obligations that *complied with*, but did not

5. As the Department of Labor argued in an *amicus* brief submitted in *Fifth Third*, disclosing information *early* and thus correcting the inflated stock price, serves to *limit* damages, as opposed to "potentially [waiting] months or years later after even more of the employees' retirement savings have been invested in the overpriced assets." Brief for the United States as *Amicus Curiae* Supporting Respondents, *Fifth Third v. Dudenhoeffer*, No. 12751, at 28 (U.S. March 2014).

exceed, obligations under the securities laws." App. at 8a (emphasis added). As the Ninth Circuit stated, ERISA fiduciaries do not "owe a *greater* disclosure duty than that imposed under the securities laws. . . [T]here is no contradiction between defendants' duty under the federal securities laws and ERISA. Indeed, properly understood, these laws are complementary and reinforcing." *Id.* at App. 9a. The Ninth Circuit agreed with the *en banc* dissent that neither the securities laws nor ERISA require "continuous disclosure." App. 8a.[6]

Finally, Petitioners argue that the Ninth Circuit ignored the "liability" standard announced by *Fifth Third*, which they interpret to mean "there is no liability if *any* prudent fiduciary . . . could . . . have concluded that [the proposed alternative action] would do more harm than good." Petition at 18 (citing *en banc* dissent at App. 12a). Rather than a "plausibility" analysis, such a reading of *Fifth Third* would make it virtually impossible to bring an ERISA claim based on nonpublic information since it is always *possible* that taking any sort of action could *possibly* cause "more harm than good" to a plan. *Fifth*

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6. The same district court judge who presided over this ERISA case presided over a similar case brought under the federal securities laws. In the securities case, Amgen's motion to dismiss was denied and the complaint upheld, notwithstanding the applicable heightened pleading standards of the securities laws. The district court concluded that the investors sufficiently alleged "material misrepresentations and omissions, scienter, reliance, and resulting economic loss." App. 32a. The district court later certified a class, which was affirmed on appeal by the Ninth Circuit and then later upheld by this Court. *Conn. Ret. Plans & Trust Funds v. Amgen, Inc.*, 660 F.3d 1170 (9th Cir. 2011), *aff'd, Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

Third's "could not have concluded" language was merely set forth as one of the points that "*inform* the requisite analysis" when a court addresses nonpublic information. *Fifth Third*, 134 S. Ct. at 2472-73. It was not meant to have a court abandon the "context-sensitive scrutiny of a complaint's allegations," *Id.* at 2470, or to cancel out the more over-arching standard that a prudent fiduciary "*would not have viewed*" an alternative action to more likely to have harmed the fund that to help it. *Id.* at 2472 (emphasis added).[7]

C. Prudential Reasons Strongly Favor Denial of the Petition

Fifth Third made clear that it was for the lower courts in the first instance to apply the considerations set forth in *Fifth Third* and to conduct a "context-sensitive scrutiny of a complaint's allegations," under Rule 12(b)(6). *Id.* at 2470. And that is *precisely* what the Ninth Circuit did. It applied the considerations set forth in *Fifth Third* to the allegations of the Complaint and found that a claim for

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7. In *In re BP p.l.c. Sec. Litig.*, No. 10-md-2815(KPE), 2015 U.S. Dist. LEXIS 27138 (S.D. Tex. Mar. 4, 2015), the district court concluded that whether a fiduciary course of action "would do more harm than good" is a question for expert testimony and thus not amenable to resolution at the motion to dismiss stage. *Id.* at *103. In doing so, the district court adopted the *Fifth Third* standard that "a plaintiff must plausibly allege an alternative action . . . that a prudent fiduciary in the same circumstances *would not have* viewed as more likely to harm the fund than help it," as opposed to *Fifth Third*'s later statement that a complaint must plausibly allege that a prudent fiduciary in the defendant's position "*could not have concluded*" that an alternative action would do more harm than good to the fund, noting that the latter formulation would be "virtually insurmountable." *Id.*

breach of the duty of prudence under ERISA had been plausibly alleged. There is no compelling reason for the Court to review the Ninth Circuit's "plausibility" analysis with respect to the allegations of the Complaint.

Moreover, the Ninth Circuit is the first and only appellate court to thus far apply the considerations concerning nonpublic information set forth in *Fifth Third*. Therefore, there is no conflict among the appellate courts that require resolution by this Court.

Finally, even if the Ninth Circuit incorrectly applied or ignored any of the considerations set forth in *Fifth Third*, that is not grounds for Supreme Court review. *See* Rule 10 (*certiorari* "rarely granted" to address "erroneous factual findings or the misapplication of a properly stated rule of law").

D. The Ninth Circuit's Ruling Will Not Have Consequences Beyond Making Fiduciaries Liable Under ERISA

The Ninth Circuit's decision, which correctly interpreted *Fifth Third*, merely holds that under the facts of this case a cause of action had been stated against the ERISA fiduciaries that may potentially hold them accountable for their imprudent conduct. Under *Fifth Third*, participants in ERISA plans are entitled to challenge fiduciary conduct without a "presumption of prudence," and redress is available when the fiduciaries of a plan are insiders in possession of nonpublic information. In such cases, fiduciaries must comply with their ERISA duty of prudence, which will mean company insiders cannot continue to sell company stock to plan participants

at inflated prices, or they will need to disclose the inside information.

Petitioners ask this Court to eliminate the possibility of any such lawsuit because "[p]rudence claims can be fact-intensive, requiring expensive and burdensome discovery," which will deter companies from offering employer stock funds, and which is contrary to "Congress's unmistakable will." Petition at 22 (citing *en banc* dissent at 19a). Congress's "will" is better captured in 29 U.S.C. § 1104(a), which unmistakenly requires fiduciaries to discharge duties to the plan they oversee with single-minded loyalty to the plan and its participants and with the prudence of a reasonable fiduciary. If Congress wants to eliminate or modify those strict fiduciary duties, it can easily do so; this Court should not.

Moreover, the Ninth Circuit's holding in this case is narrower than Petitioners claim. It applies only to the ERISA fiduciaries who are *also alleged violators of the federal securities laws*. App. 43a. The Ninth Circuit recognized that when the *same* persons who have a disclosure duty under the federal securities laws are also fiduciaries under ERISA, they satisfy both laws by being truthful. The Ninth Circuit's opinion makes no new law and imposes no new duties on ERISA fiduciaries.

II. THE APPLICATION OF A PRESUMPTION OF INDIVIDUAL DETRIMENTAL RELIANCE TO AN ERISA CLAIM DOES NOT WARRANT SUPREME COURT REVIEW

In Count III, Respondents alleged that the fiduciaries violated their duty of loyalty and care under ERISA

§§ 404(a)(1)(A)-(B), 29 U.S.C. §§ 1104(a)(1)(A)-(B), by misrepresenting the financial condition of Amgen.[8]

The district court dismissed Count III, based solely on its conclusion that Respondents did not plead facts sufficient to plausibly allege that Respondents had detrimentally relied on the allegedly material misstatements. App. 104a-105a. The Ninth Circuit reversed the district court, holding that a rebuttable presumption of individual reliance, based on the "fraud-on-the-market" theory established in *Basic*, 485 U.S. at 246, should apply to an ERISA "duty of candor" claim. As the Ninth Circuit stated: "We see no reason why ERISA plan participants who invested in a company stock fund

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8. Petitioners do not dispute that making false or misleading statements to plan participants in ERISA communications may be actionable. Nor do they claim that there is any conflict among the Circuits on the viability of such a claim. As the Ninth Circuit stated:

> We have recognized "[ERISA] fiduciaries breach their duties if they mislead plan participants or misrepresent the terms or administration of a plan. . . . A fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information." *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995) (internal citations omitted). "[T]he same duty applies to 'alleged material misrepresentations made by fiduciaries to participants regarding the risks attendant to fund investment.'" *Edgar v. Avaya*, 503 F.3d 340, 350 (3d Cir. 2007).

App. 46a (citing *Quan*, 623 F.3d at 886). *See also Howe*, 516 U.S. at 506 ("[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA").

whose assets consisted solely of publicly traded common stock should not be able to rely on the fraud-on-the-market theory in the same manner as any other investor in a publicly traded stock." App. 46a-47a.

A. There is no Dispute in the Courts As to Whether a Presumption of Reliance Applies to an ERISA Duty of Candor Claim

Petitioners argue that the presumption of reliance should never be applied to ERISA cases because, they speculate, unlike investors in general, employees of a company who invest in their own company are influenced by factors other than stock price. Petition at 25. However, there is no dispute in the Courts of Appeals on whether the presumption of reliance should be applied in an ERISA case (and, by the same token, no appellate court has held that the presumption of reliance is *inapplicable* to an ERISA case involving misrepresentations of company securities traded in an efficient public market). Indeed, the Ninth Circuit is the first appellate court to even find it necessary to invoke the presumption of reliance.

Petitioners admit they are asking for review only because "allowing the decision below to stand would encourage other courts to follow the Ninth Circuit's example by either extending *Basic* to ERISA claims or perhaps even applying it in still other areas of the law without adequately considering the propriety of such extensions." *Id.* at 26. But that is not an appropriate ground for Supreme Court review, especially in the absence of any indication that an issue is either recurrent or has caused division among the lower courts, and especially with such a question of first impression. *See* Sup. Ct. R. 10.

B. A Presumption of Reliance in an ERISA Duty of Candor Claim is Unlikely to be a Subject of Dispute

It is unlikely that the issue of whether a presumption of reliance applies to an ERISA case will become a subject of dispute in the courts because individual plan participants are not required to show reliance on a misrepresentation. Rather, a complaint need only allege that losses *to the plan* resulted from the breach.[9] Losses in an ERISA breach of duty of candor case may well be limited to the purchases made by participants of the plan during specified a class period. However, that is a question of damage causation, not reliance. And because no appellate court has ever addressed that issue, review by the Court at this time is not necessary.

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9. *See, e.g., Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 191 (W.D. Mo. 2009) ("Because ERISA § 502(a)(2) focuses on plans, rather than individuals, the Court finds persuasive those cases which have held that plaintiffs need not establish individual reliance in order to prevail") (listing cases). The decisions cited by Petitioners (Petition at 22-23) do not support the need for allegations of individual reliance in an ERISA misrepresentation action. In *Bell v. Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010), the misinformation concerned an employee stock option plan which was not governed by ERISA. Thus, no breach of fiduciary duty under ERISA was involved. In *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 228-29 (3d Cir. 2009), the misrepresentations were made by the defendant in a fiduciary capacity in individual face-to-face meetings with retiring employees. Therefore, the employees needed to prove that they had detrimentally relied on the face-to-face misrepresentations. In *In re Cardinal Health ERISA Litig.*, 424 F. Supp. 2d 1002 (S.D. Ohio 2006), the district court expressly "decline[d] to decide whether the [fraud-on-the-market] presumption applies in an ERISA context." *Id.* at 1046.

C. The Ninth Circuit's Application of the Presumption of Reliance was Correct

To the extent that individual reliance is a necessary element of an ERISA duty of candor claim, the Ninth Circuit's application of a presumption of reliance was correct. In *Basic*, 485 U.S. at 246-47, the Court recognized the practical realities of impersonal markets on which publicly traded stocks are bought and sold, and it expressly approved the rebuttable presumption of reliance based upon the "fraud-on-the-market" theory as a way to prove reliance in a claim under the federal securities laws. *See also Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (reaffirming the fraud-on-the-market presumption of reliance). As the Court explained in *Basic*, the presumption of reliance is warranted by common sense and probability, since no rational investor "would knowingly roll the dice in a crooked crap game." 485 U.S. at 247 (quoting *Schlanger v. Four-Phase Systems Inc.*, 555 F. Supp. 535, 538 (S.D.N.Y. 1982)). Common sense and probability likewise justified the Ninth Circuit's application of the presumption of reliance in this case. Moreover, it cannot be argued that ERISA plan participants would save for retirement by knowingly buying company stock at a manipulated, artificially inflated price.

D. The Ninth Circuit Did Not Extend the Presumption of Reliance to "Holders"

Petitioners claim that the Ninth Circuit improperly extended the presumption of reliance "to ERISA plaintiffs who made no purchase or sale during the class period," thereby "giving holders a claim under ERISA that *Blue Chip* [*Stamps v. Manor Drug* Stores, 421 U.S. 723 (1975)]

denied to them under the securities laws – and thus *expanding* the *Basic* presumption. . .". Petition at 24.

Petitioners simply misread the scope of the Ninth Circuit's ruling. The Ninth Circuit's ruling did not give "holders" such a claim. Rather, citing *Basic* and *Halliburton*, the Ninth Circuit held that an investor may rely on public misstatements "whenever he ***buys or sells*** stock at the price set by the market." App. 47a (emphasis added) (citing *Basic*, 485 U.S. at 246 and *Halliburton*, 131 S. Ct. at 2185). Review by this Court is therefore certainly not warranted on this purported ground.

CONCLUSION

The Petition for a writ of certiorari should be denied in its entirety.

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